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No. 93-628

In The

Supreme Court of the United States

October Term, 1993

WILLIAM MINEER,

Petitioner,

versus

FLEMING COUNTY, KENTUCKY; FLEMING COUNTY FISCAL COURT; JEWELL CALL, Fleming County Judge/Executive, in his official and individual capacity; and the FLEMING COUNTY FISCAL COURT MEMBERS, Gary C. Harmon, Andy Cole, John Sims, Ronnie Carpenter, William Thompson, and L.C. Cord, in their official and individual capacities,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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JURISDICTION

This Court does have jurisdiction to consider the Petition for Writ of Certiorari herein. The first opinion of the United States Court of Appeals for the Sixth Circuit was filed on May 4, 1993. (See Petitioner's Appendix "A" to Petition for Writ of Certiorari) That Opinion began as follows:

"James P. Churchill, Senior District Judge, *delivered the Opinion of the Court*. Guy, Circuit Judge, delivered a separate opinion, concurring in part and dissenting in part, in which Ryan, Circuit Judge, concurred" (Emphasis added).

Judge Churchill, in what the Sixth Circuit then described as *the Opinion of the Court*, found that the Magistrates were qualifiedly immune, but that Judge/Executive Call was not. Judge Guy, in his dissent from the *Opinion of the Court*, indicated that he would have granted both the Magistrates and the Judge/Executive qualified immunity.

The Defendants then filed a Motion to Enforce the Mandate of the District Court arguing that since it appeared that Judge Ryan agreed with Judge Guy's dissent, then that was actually the majority opinion of the Court. The Petitioner opposed that Motion indicating that the Clerk of the Court declined to interpret the opinion of the Court and also that a staff attorney with the Sixth Circuit Court of appeals advised Petitioner that obviously Judge Churchill's opinion and conclusion were the opinion and conclusion of the Sixth Circuit. Responding, the District Court noted that the Sixth Circuit's opinion was "rather confusing", but ruled that Judge Churchill's opinion was "actually *the Opinion of the Court*", and entered an Order and Judgment granting the Motion to Enforce the Mandate of the Sixth Circuit (per Judge Churchill's opinion) and denying the Motion to Dismiss the action (Emphasis added). He further ordered that the Magistrates be dismissed, but that the Plaintiff's remaining claims against the remaining Defendants be assigned for a jury trial, but allowed 30 days for Respondents' counsel

to seek a clarification of the decision of the Sixth Circuit Court of Appeals dated May 4, 1993. This Order was entered July 23, 1993.

The next pleading came in the form of a Petition for Writ of Mandamus filed by counsel for the Respondents. Although counsel for the Respondents would have this Court believe that only Defendant Call continued to litigate this matter after the Sixth Circuit's May 4, 1993, opinion (See Respondents' Brief in Opposition p.2), it wasn't until the District Court's order dismissing the Magistrates dated July 23, 1993, that counsel for Respondent began to caption his cases as "In Re: Jewell Call, Individually and in His Official Capacity as Fleming County Judge/Executive." Previously, Respondents had captioned all of their pleadings as "William Mineer vs. Fleming County, et. al."

Next preceding this Petition for Certiorari, the Sixth Circuit Court of Appeals, Judges Guy, Ryan and Churchill sitting, entered an Order (see Appendix B to Petition for Certiorari) on September 3, 1993, which stated in relevant part:

> "Judge Churchill's opinion concluded that the denial of Summary Judgment was reversed as to the Six Magistrates but affirmed as to the Petitioner. However, Judge Guy's opinion dissented as to the Petitioner and stated that he would grant the Petitioner qualified immunity. Judge Ryan concurred in that opinion and that concurrence effectively makes Judge Guy's opinion the majority opinion as to the Petitioner. Therefore, Judge Churchill's opinion expresses the majority result with respect to the Magistrates, but Judge Guy's opinion, even though

written as a dissent, states this Court's conclusions with respect to the Petitioner. This *clarification* should eliminate any confusion arising from the prior opinion.

It therefore is ordered that the District Court shall take all appropriate stops to enforce our mandate as stated above. In view of this *clarification*, it is ordered that the Petition for a Writ of Mandamus is dismissed." (Emphasis added.)

The Respondents argue that there is no authority either in the United States Code, the Rules of this Court or in the case law which would allow an automatic extension of time in which to file a Petition for Writ of Certiorari from a final opinion of a federal court of appeals simply because the Petitioner misunderstood the import of the decision of the Court of Appeals. What the Respondents fail to concede however, is that none of the parties to this action nor the United States District Judge understood how to interpret the Sixth Circuit's Court of Appeals May 4, 1993, opinion. This is readily evident by the numerous pleadings and clarifying orders following that opinion. Up until the District Court's order and opinion dated July 23, 1993, all of the Respondent's continued to litigate this matter. It wasn't until then that counsel for the Respondents tried to begin severing Call from the Magistrates.

In addressing situations exactly like the case at hand, this Court has held that:

"Only when a lower court changes matters of substance, *or resolves a genuine ambiguity*, in a judgment previously rendered should the period within which an appeal must be taken or

> a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by it's prior Judgment, had been *plainly* and properly settled with finality." (Emphasis added.)
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> *Federal Trade Commission v. Minneapolis-Honeywell Regulator Company*, 344 U.S. 206, 211-12, 73 S.Ct. 245, 249, 97 L.Ed. 245 (1952).

This Petitioner submits that is it clear from the record that the May 4, 1993, opinion of the United States Court of Appeals for the Sixth Circuit created a genuine ambiguity, and that prior to the Sixth Circuit's final order entered September 3, 1993, none of the parties rights or obligations had been settled plainly and properly as mentioned in this Court's test articulated above. Even the District Court Judge was in agreement with the Petitioner's interpretation of the May 4, 1993, opinion and order until the Sixth Circuit handed down its September 3, 1993, clarification.

Therefore, Petitioner submits the Petition for Certiorari filed herein was timely and this Court has jurisdiction over its consideration.

Respectfully submitted,

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